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NO. 342

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

VINCENT A. PALISI

Petitioner

V.

LOUISVILLE & NASHVILLE
RAILROAD COMPANY, INC.

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

A. F. LANKFORD, III
622 First National Bank Building
Mobile, Alabama
Counsel for Respondent

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OPINIONS BELOW

See page 1 of the petition.

JURISDICTION

See page 2 of the petition.

STATUTES AND REGULATIONS INVOLVED

The statutes enumerated in the petition at page 3 and in the appendix at pages A9 and A10, were considered by the trial and appellate Courts in determining their ultimate conclusions and do not appear to respondent to be a matter of contest as to this petition nor directly involved in its ultimate determination.

QUESTIONS PRESENTED

Petitioner's eight questions (petition pages 2 and 3) do not appear to Respondent to properly raise the ultimate point required for decision by this petition. Contrary to the opinion of Petitioner, the trial and appellate courts did apply local laws in determining the issues and the weight and sufficiency of the evidence. They both agreed in the result. The sole question raised here is one of the weight and sufficiency of the evidence only.

STATEMENT OF THE CASE

So much of Petitioner's statement of the case, commencing on page 4 and going through the last full paragraph thereof on page 5, is generally correct, save the averment that Miss LeCourt drove her automobile in a normal manner for traffic leaving the base. This simply is not so. [The air patrolman on duty at the gate testified that she nearly ran him down, came up in the wrong lane and refused to stop on his or the train's signal (R-358, 361)]. The remaining references to the record and evidence omit material considerations which Respondent feels obligated to note.

On the morning preceding the accident, the decedent, Jeanne LeCourt and LeCourt's thirteen (13) year old sister left Waveland, Mississippi, in the LeCourt automobile to go to Keesler Field some thirty (30) miles distant, to pick up Roger Alverson, an airman stationed at the base, who was to be the younger LeCourt's escort (R-226-228). Contrary to that stated by Petitioner that the driver and the deceased were unfamiliar with the area where the accident occurred, the testimony showed that the party entered Keesler Field in the morning, through Gate 1, which necessitated crossing the L. & N. railroad tracks (R-245). After obtaining information as to the location of Alverson they drove out Gate 1 again over the tracks, thence westward by and parallel to the tracks until they came to Gate 6 (R-246), where they again crossed the L. & N. tracks and re-entered the

Field. After discovering that Alverson was not ready to leave, they left the field going out again over the tracks through Gate 6 (R-249). Subsequently, they returned to Keesler again entering through Gate 6 and over the tracks (R-249). After finding Alverson this time, they again left the base, leaving through Gate 6, and over the tracks, returning to Waveland (R-250). Later during the day there was additional traveling about and general consumption of gin and beer (R-252, 253 and R-271). The party ultimately returned to the Waveland home of the LeCourts at about 1:00 A.M. on the morning of the accident (R-254). They continued to party (R-255) until about 2:30 A.M. when Alverson insisted on being taken back to the base (R-256). The deceased and Alverson were to spend the night at the LeCourts, but Alverson would have none of it and even though the deceased had put on his pajamas, he finally agreed with Jeanne LeCourt, driver, to return Alverson to Keesler Field. This was about 3:00 A.M. (R-257).

The deceased drove the automobile to Keesler (R-258) entering through Gate 6 over the same tracks. After depositing Alverson (and contrary to the averment of the declaration [R-116-122]), the deceased told the driver, Jeanne LeCourt, that he was tired and asked her to drive him home (R-259). Also, contrary to the allegations of the declaration (R-116-117-122) the deceased directed the driver's route to Gate 6 (R-259). On turning to cross the L. & N. tracks at Gate 6 where the accident occurred, the driver was crossing the tracks for the sixth time that day. The photographic evidence introduced in the trial below (Defendant's Exhibits 2, 3, 4, 6, 8 and 10) graphically represented the view that one would have of the guard shack, the guard, the railroad track and the railroad track signs, as well as the open and unobstructed view of an approaching train.

There is no question of subsequent negligence in the operation of the train (R-285, 286, 287, 288). The speed of the locomotive was approximately 30 miles an hour (R-293). The right of way was one hundred feet wide

at this point (R-304-306). A general lookout was kept; the whistle was blown; the bell rung, and the crossing well lighted (R-290).

Airman Thomas M. Porter, stationed at Keesler Field, was standing at the crossing and observed the collision. He saw that the automobile nearly ran down the guard who attempted to flag her as she passed through Gate 6, and saw that the car continued over the crossing without ever stopping (R-21, R-42, R-109, R-46). Airman Porter further testified that as the automobile approached toward the crossing down the four lane street that runs parallel with the tracks, it was in the wrong lane for traffic and was in an almost dead heat with the train for about one block, both running in the same direction (R-57, 58).

Air policeman, Bertholotti, stationed at Gate 6, testified (R-355, 356) that he heard the bell and whistle of the train; saw it approaching; saw the vehicle in the west or wrong lane of the four lane road; and stepped out into the middle of the street and tried to stop the automobile (R-358). Instead, the driver swerved around him without stopping so that he had to jump out of the way to keep from being hit (R-361). He then watched it continue up onto the tracks where simultaneously it was hit by the train. There was no reason why she could neither see nor hear the approaching train.

In regard to the sign required by law to be erected by the railroad at the crossing, the evidence is clear that it was established on the right hand side of the roadway at the edge of the railroad right of way (R-304, 305, 306). The visibility of this sign is more graphically reflected by the photographic exhibits (Defendant's Exhibits 2, 3, 4, 5, 8 and 10) (R-356). Thus, the actual questions raised as to the sign were two-fold: (1) Whether the physical facts reflected by the photographs laid at rest the nebulous argument of plaintiff's counsel and witness that it could not be seen; and (2), in view of the actions of the air patrolman on duty, was the ability

to see the sign or not and the company's actions or lack of action in connection therewith an efficient proximate contributing cause of the accident? The answer to these questions is solely one involving the weight and sufficiency of the evidence which both lower courts held contra to Petitioner's position.

ARGUMENT

I. The ruling of the lower courts were correct.

It is contended by Petitioner that this being a diversity case, the trial and appellate courts applied what is referred to as the "Federal Test" rather than the "State Test" in considering the weight of the evidence. It is apparently hoped by the Petitioner, that in mentioning these two tests, this Court can be persuaded to review what is purely a question of the weight of the evidence by inferring that the issue involved is one which Mr. Chief Justice Warren found unnecessary to consider in the case of **Dick v. New York Life Insurance Company,** 359 U.S. 437, 3 L.Ed.2d 935, 79 Sup. Ct. 921. We submit that such a point is not raised by the actions of the lower courts and is not here for determination.

Petitioner implies that since there has been a showing of possible violation of state statutes, and in light of the presumption of fault raised by **§1741 of the Code of Mississippi of 1942, Recompiled** (Appendix D, page A9), it was obligatory that the trial court submit all issues of negligence to the jury. Therefore, the Court's subsequent granting of the motion for judgment notwithstanding is contrary to these requirements of state law as determined by the Supreme Court of Mississippi and is thus an application of the "Federal Test".

Carried to its logical conclusion, Petitioner's argument would mean that every issue of fact should and must be submitted to a jury. Such is not the law in the federal courts nor is it the law in the state courts of Mississippi. **Fayard v. L. & N. R. Co.,** 48 So.2d 133; **New Orleans & N. E. R. Co. v. Burney,** 159 So.2d 85; **New Orleans & N. E. R. Co. v. Burge,** 2 So.2d 825; **Thompson v. Mississippi Central R. Co.,** 166 So. 353; **Herron v. Southern Pacific Co.,** 51 Sup.Ct. 383, 75 L.Ed. 857; **Blass v. Virgin Pine Lumber Co.,** 50 F.2d 29. Mississippi recognizes the propriety of judgments notwithstanding and likewise recognizes that sometimes trial courts make

mistakes in submitting issues to juries which require the Supreme Court to reverse and render. See **Illinois Central R. Co. v. Smith, et al,** 140 So.2d 856. The cited state cases involve situations where consideration was necessarily given to the so-called "prima facie" statute of the State of Mississippi, as well as other statutes. Both state and federal courts recognize that the quantity and quality of proof are matters which the court must pass upon and that in all cases, possibilities and conjectures must be excluded from the equasion. **Braud v. Baker,** 5 Cir., 324 F.2d 213; **New Orleans & N. E. R. Co. v. Burge,** 2 So.2d 825; **2 Restatement of Torts 1163.** Indeed, in such considerations the Supreme Court of Mississippi has concurred with the opinions of the federal courts and vice versa that it is not within the legitimate province or power of the jury to convert possibility into something more by the mere force of a verdict. **Burge case supra; Teche Lines, Inc. v. Bounds,** 182 Miss. 638, 649, 179 So. 747. See also **Yazoo & M. V. R. Co. v. Lamensdorf,** 178 So. 80; and **Yazoo & M. V. R. Co. v. Green,** 147 So. 333.

Under subheading "b" entitled "Presumption of Fault", page 12 of the petition, Petitioner seeks to cite the **Brooks** case as authority that the District Judge apparently resorted to conjecture and surmise himself, ignoring the presumption created by statute, and argues that more weight should be given to §1741 than the present law permits. The actual effect of §1741, the "prima facie" statute, was laid at rest by this Honorable Court in the cases of **Mobile & J. K. C. R. Co. v. Turnipseed,** 219 U. S. 35; **Pennsylvania R. R. Co. v. Chamberlain, Admx.,** 288 U. S. 333, and **Western & A. R. Co. v. Henderson,** 279 U. S. 639. The law as laid down by these decisions have been followed by the state courts. See **Fayard v. L. & N. R. Co., supra.**

To grant certiorari in this instance would simply constitute the affording to the Petitioner a second right of appeal and nothing more. This is not a case whose decision involves principles, the application of which are

of wide public or governmental interest, which needs to be authoritatively declared by this court. The mere insistence by the Petitioner that the plaintiff below was deprived of his constitutional right to a trial by jury guaranteed by the Seventh Amendment and that both the district and appellate court refused to follow the Mississippi law as required by the decision in **Erie R. Co. v. Thompkins,** 304 U. S. 64, 82 L.Ed. 1188, 58 Sup.Ct. 817, does not make this so, and if his position were to be sustained, it would necessarily imply that every granting of a motion for judgment notwithstanding arising under diversity cases in the State of Mississippi would be sufficient considerations for writs of certiorari to this Court. Indeed, if you applied both the state and federal test to the actual issues involved in weighing the sufficiency of the evidence, you would find that they are substantially the same for neither Mississippi nor the federal decisions permit verdicts to stand which are based on mere speculation vis-a-vis probative facts. **Galloway v. United States,** 319 U. S. 372, 395, 87 L.Ed. 1458, 1473, 63 Sup.Ct. 1077; **New Orleans & N. E. R. Co., v. Burge,** 2 So.2d 825.

II. **This is not an appropriate case for Certiorari.**

The trial and appellate courts both gave due and appropriate consideration to the rules of law laid down by the state court and where this is so, the Supreme Court of the United States ordinarily accepts their determination. (See the opinions rendered in the courts below found in the petition Appendix A1 and A2). **Richards v. United States,** 369 U. S. 1, 7 L.Ed. 2d 492, 82 Sup.Ct. 585; **Appalachian Power Company, et al v. American Institute of Certified Public Accountants, et al,** 4 L.Ed. 2d 30, 80 Sup.Ct. 16. Giving full faith and credit to these statutory requirements of the Mississippi law, and the case law interpreting same, both the trial and appellate courts concluded that there was no substantial evidence of any negligence on the part of the railroad that was the proximate cause of the death in question.

As so often stated:

> "The federal court enforces the state created right by rules of procedure which it has acquired from the Federal Government and which, therefore, are not identified with those of the state courts."

Bernhardt v. Polygraphic Co., 350 U. S. 202, 100 L.Ed. 199, 76 Sup.Ct. 273. This does not "assure uniformity of judical decision . . . [or] immunity from judicial error . . ." for as stated were it otherwise every alleged misapplication of state law would constitute a federal constitutional question. **Beck v. Washington**, 369 U. S. 541, 8 L.Ed. 2d 98, 82 Sup.Ct. 955.

In the case of **Herron v. Southern Pacific Co., 283** U. S. 91, 51 Sup.Ct. 383, 75 L.Ed. 857, this Court said:

> "The function of the trial judge in a federal court is not in any sense a local matter, and state statutes that would interfere with the appropriate performance of that function are not binding on the federal court under either the 'conformity act' or 'rules of decision act'."
>
> * * * * *
>
> "The judge must exercise superintendence over the trial and is enjoined to instruct them on the law and advise them on the facts and to set aside their verdict if, in his opinion, it is against the law and the evidence."

See **Braud v. Baker**, 5 Cir., 1963, 342 F.2d 213; **Revlon, Inc. v. Buchanan**, 5 Cir., 1959, 271 F.2d 795, 800.

As noted in the trial court's opinion, the judge acknowledged that he was not free to reweigh the evidence and did not do so but within the confines of the straight jacket of both federal and state law in this type of instance, both the district and appellate courts considered

that the testimony did not fall within the statewide legal standards that the evidence was substantial and reasonably believeable. The state court laid down the similar principle thusly in **Yazoo & M. V. R. Co. v. Lamensdorf**, 178 So. 80:

> "The scintialla of evidence rule has been discarded in nearly all jurisdictions, and is not recognized in this state; but verdicts must be based upon substantial evidence and that evidence must be reasonably believeable. Whatever a jury might here or there chance to believe, we must require that the evidence upon which they act must be within statewide legal standards, and one of these, as said, is that the evidence be substantial and must be reasonably believeable."

Petitioner contends that a different rule is followed in the Fifth Circuit from that found in the Sixth and Eighth Circuits (Proposition III, page 18 of the petition). Frankly we can find no such distinction and our reading of the cited opinions leads us to the conclusion that these respective circuits are very much in accord.

This case being a matter of considering merely the weight of the evidence and its tendencies, and not one effecting other litigants or representing any major conflicts between the Federal Government and state government, it is not an appropriate case for review by this court on petition or otherwise. **Appalachian Power Co., et al v. American Institute of Certified Public Accountants, et al, supra; Richards v. United States, supra; General Box Company v. United States**, 351 U. S. 159, 100 L.Ed. 1055, 76 Sup.Ct. 728.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully Submitted,

A. F. LANKFORD, III
Counsel for Respondent
622 First National Bank Building
Mobile, Alabama

Of Counsel:

HAND, ARENDALL, BEDSOLE,
GREAVES & JOHNSTON

and

MORSE & MORSE

CERTIFICATE OF SERVICE

I, hereby certify that I have mailed a true and correct copy of the foregoing brief for respondent to the Honorable Albert Sidney Johnston, Jr., counsel for Petitioner, by depositing same in the United States mail, postage prepaid, addressed to him at 3-5 Schwann Building, Biloxi, Mississippi, on this 29th day of January, 1965.

A. F. LANKFORD, III